JD–15–19
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HBC MANAGEMENT SERVICES, INC.

and Case 05– CA–219166

NATIONAL UNION, UNITED SECURITY &
POLICE OFFICERS OF AMERICA

Brendan Keough, Esq., for the General Counsel.
Brad S. Miller, Esq. (Cooper & Miller, LLC),
Philadelphia, PA, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on December 10, 2018. The complaint alleges that, since January 23, 2018, HBC Management Services, Inc. (the Company or Respondent) has failed and refused to bargain collectively with the National Union, United Security & Police Officers of America (the Union or Charging Party) over wage rate increases in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).[1] The Company denies the allegations and argues in the alternative that any violation on its part for failing to bargain is precluded by the Union's own bad faith failure to bargain.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged in providing security, janitorial and grounds-keeping services, including security services to the United States Department of the Navy (the Navy) at the Washington Navy Yard Naval Sea Systems Command (NAVSEA) and Military Sealift Command (MSC) in Washington, D.C. The Company, which also performs services annually valued more than $50,000 in states other than the District of Columbia, admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6),

[1] 29 U.S.C. § 151 et seq.

and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

The Company, a division of the Hana Group, maintains offices in Honolulu, Hawaii, Wayne, Pennsylvania and Alexandria, Virginia. Irwin Cockett, the Company's president, is based in Honolulu. Bradley Cooper, the chief operating officer, is based in Wayne, Pennsylvania. Ursula Quan is director of human resources. From December 2017 until late January 2018, Clifton Metaxa was director of operations. Charles Carroll and Chris Taylor served for a portion of the relevant period as project managers at the Washington Navy Yard site. All were agents and/or agents within the meaning of Sections 2(11) and 2(13) of the Act.

B. *The Company's Contract with the Navy*

1. Scope of the Contract

At issue is the Company's service contract with the Navy in which it provides approximately forty armed and unarmed security guards at the Washington D.C. Navy Yard (the Navy contract). The Company won the contract by competitive bid in 2015. James Waite has been the Navy's contracting officer during the term of the Navy contract. Although formal notifications were sent to Cockett, Cooper was responsible for the administration of the contract.

The Navy contract is a one-year base contract with four option years beginning on February 1 of each year at the Navy's discretion. As a contractor providing services to the federal government in an amount exceeding $2,500, the Company is subject to the Service Contract Act (the SCA). The SCA mandates that federal government service contractors pay their employees, at a minimum, a wage rate established by the Department of Labor (DOL). The SCA does not, however, establish a maximum wage rate a contractor can pay its employees, nor does it require the federal government to reimburse a contractor for an agreed to wage rate arrived at through collective-bargaining. In circumstances where the wage rate negotiated through collective-bargaining is greater than the minimum set by the DOL, that wage rate replaces the minimum wage rate, provided the agency deems the wage rate reasonable.

2. Applicable Federal Acquisition Regulations

As a service contractor doing business with the federal government, the Company is also subject to Federal Acquisition Regulations (FAR) which provide guidelines for contractors seeking modifications to current contracts, including wage modifications. FAR 22.1012-2, Wage Determinations Based on Collective Bargaining Agreements, states, in pertinent part:

> 2. (b) For contractual actions other than sealed bidding, a new or changed collective bargaining agreement shall not be effective under 41 U.S.C. 6707(c) if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1007(b),

provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the work shall be effective for purposes of the successor contract under 41 U.S.C. 6707(c).

3. (c) The limitations in paragraphs (a) and (b) of this subsection shall apply only if timely notification required in 22.1010 has been given.

4. (d) If the contracting officer has submitted an e98 to Department of Labor requesting a wage determination based on a collective bargaining agreement and has not received a response from the Department of Labor within 10 days, the contracting officer shall contact the Wage and Hour Division by telephone to determine when the wage determination can be expected. (The telephone number is provided on the e98 website.) If the Department of Labor is unable to provide the wage determination by the latest date needed to maintain the acquisition schedule, the contracting officer shall incorporate the collective bargaining agreement itself in a solicitation or other contract action (e.g., exercise of option) and include a wage determination referencing that collective bargaining agreement created by use of the WDOL website (see 22.1008-1 (d)(2)).

Section 22.1010, "Notification to interested parties under collective bargaining agreements" states in full:

1. (a) The contracting officer should determine whether the incumbent prime contractor's or its subcontractors' service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer shall give both the incumbent contractor and its employees' collective bargaining agent written notification of –

    a. (1) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be); or

    b. (2) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or

    c. (3) The forthcoming multiple year contract anniversary date (annual anniversary date or biennial date, as the case may be).

2. (b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date in order for the time-of receipt limitations in paragraphs 22.1012-2(a) and (b) to apply. The contracting officer shall retain a copy of the notification in the contract file.

C. *The Collective Bargaining Agreement*

A portion of the Company's security guards at the Navy Yard have been represented by the Union for the purposes of collective-bargaining since the inception of the Navy contract in 2015. Since then, the parties have negotiated a collective-bargaining agreement in which the Company has recognized the Union as the exclusive representative of the following employees who constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act (the unit):

> All full-time and regular part-time security officers employed by the Employer at the Washington Navy Yard NAVSEA and Military Sealift Command (MSC).
>
> Excluded: All security officers holding the rank of lieutenant and above; and Project Managers, Assistant Project Managers and Site Managers; all Officers and Directors of the Employer; all nonsecurity employees; all office, plant, and facility clerical employees; all other employees; all managerial employees, all confidential employees and all supervisors as defined in the Act.

The CBA is effective from January 9, 2017 through January 31, 2020. Ishun Richards is the Union's national vice president and chief negotiator. ShaDawn Prince serves as the Union's executive director. Prior to the execution of the CBA, Richards and Metaxa or Cooper communicated by email and telephone in December 2016 and January 2017. It was not until January 9, 2017 when Waite, the Navy's contracting officer, imposed a sudden deadline on the parties to finalize the agreement by the end of the day. At that time, it took the parties approximately six hours to negotiate the current wage rate identified in Appendix A of the CBA. Given the hurried circumstances, however, Richards sought and Cooper agreed to include language enabling the Union to pursue wage increases in the option years:

> Pursuant to a prior Adoption and Extension of Collective Bargaining Agreement between these parties, the parties have earlier agreed to meet to bargain over potential increased rates for Wages that would go into effect on February 1, 2018 and February 1, 2019; or alternatively, to bargain over wage reopener provisions relating to those respective dates.[2]

The CBA provisions at issue in this case relate employees' wages (Article XXVI), pensions (Article XXV) and health and welfare benefits (Article XXIV) state as follows:

> <u>WAGES</u>
>
> Effective February 1, 2017 $25.82/hour

[2] Apparently referring to other contracts, Cooper testified that negotiated wage increases were always tied to the "beginning of an option period" because of the SCA's mandate that wages in approved collective-bargaining agreements become the wage determination. (Tr. 92-93.) Richards, however, provided credible and undisputed testimony that the parties had no separate agreements that wage negotiations had to be completed before the beginning of an option year. (Tr. 22, 29.)

Pursuant to a prior Adoption and Extension of Collective Bargaining Agreement between these parties, the parties have earlier agreed to meet to bargain over potential increased rates for Wages that would go into effect on February 1, 2018 and February 1, 2019; or alternatively, to bargain over wage reopener provisions relating to those respective dates.

HEALTH AND WELFARE

Effective February 1, 2017 $4.85/hour

Pursuant to a prior Adoption and Extension of Collective Bargaining Agreement between these parties, the parties have earlier agreed to meet to bargain over potential increased rates for Health and Welfare that would go into effect on February 1, 2018 and February 1, 2019; or alternatively, to bargain over wage reopener provisions relating to those respective dates.

PENSION

Effective February 1, 2017 $1.25/ hour

Pursuant to a prior Adoption and Extension of Collective Bargaining Agreement between these parties, the parties have earlier agreed to meet to bargain over potential increased rates for Pension that would go into effect on February 1, 2018 and February 1, 2019; or alternatively, to bargain over wage reopener provisions relating to those respective dates.

D. *Union Seeks to Bargain over Wage Rate Increase*

Given that the third option year in the Navy contract was scheduled to begin on February 1, 2018, Richards assumed that any proposed changes to employee compensation needed to be submitted to the Navy prior thereto. Recalling the Navy contracting officer's initial insistence during the previous year that the parties conclude bargaining by a certain date, Richards emailed Metaxa and Taylor on December 8, 2017 requesting that the Company bargain collectively about wage rate increases pursuant to Appendix A of the CBA:

> Good morning all, The Union would like to request to bargain for the members of the Washington Navy Yard. This is in reference to the economic re-openers agreed to in the last CBA. There are also language issues that the Union would like to address also. These language proposals will be submitted soon. The Union is aware of the need to complete negotiations by December 31, 2017 per the Contracting Officer.

On December 11, Dian Lloyd, a Navy contract specialist, emailed Cockett on behalf of the Company a copy of the Preliminary Notice for Option Year 3. Cockett forwarded that form to Cooper on December 12 for "FYI and action." Neither Richards nor anyone else on behalf of the Union was copied on that email or otherwise provided with a copy of the Navy's notice.[3] On December 13, Metaxa replied to Richards' email but omitted any reference to the Navy's notice regarding Option Year 3 and downplayed the notion of a deadline:

[3] Waite apologized to Richards for that "oversight" on November 27, 2018. (GC Exh. 4; Tr. 52-53.)

> lshun, Greetings. I do not know if you've heard, but Chris Taylor no longer works for HBC Management Services. He accepted a position with the government. I am filling in as the PM until we hire someone for the position. I will be your POC for these negotiations. Thank you for the email concerning the Navy Yard CBA. Yes, please send me your economic and language proposal ASAP. We need to stay focused on getting this done before the upcoming option year. Incidentally, I am not aware of a December 31st deadline you refer to in your email. Please elaborate. Thank you.

On December 19, Cooper emailed the Preliminary Notice for Option Year 3 form to Metaxa and Quan with the following instructions:

> [Ursula], please see the attached notice to exercise Option 3 of our RSGS contract. Note the comment regarding our VETS *4211.* This needs to be done before they can exercise the option, and once filed, we need to inform the contracting office. Can you kindly keep me updated? Tx.
> Cliff, you need to complete the attachment, as follows: Check the second and third boxes. The second box is in respect of the ongoing negotiations with CBD union. The third box is for the Navy Yard. Include a copy, but make a notation that the union has requested a reopener on wages.[4]

E. *The Union Submits its Wage Proposal*

There was no communication over the next month between the Company and the Union. In December 2017, however, Richards, Cooper and Metaxa were already engaged in protracted wage negotiations concerning the security guard contracts at another agency. During those negotiations, Cooper requested that Richards substantiate the Union's wage proposals with information from comparable security contracts. That requirement was rooted in the federal government's need for substantiation of proposed wage determinations exceeding set minimum wage rates.

Between December 2017 and January 19, 2018, Richards attempted to obtain comparable wage information from security contractors at other Navy or military sites but was unsuccessful due to national security concerns. He ultimately generated a 3% wage increase proposal based on the 2.4% wage increase granted to the United States uniformed services, plus .6% to account for risk factors inherent in securing the Navy Yard.[5]

In the interim, on January 17, the Navy sent Cooper an Amendment of Solicitation/Modification of Contract with the cumulative contract price increased to an undisclosed amount but incorporating and continuing the initial CBA terms.[6] The Union was not copied on that correspondence. Without notifying the Union or including a statement that the

[4] A copy of the completed form returned to the Navy was not offered into evidence, so there is no proof that Metaxa submitted it with a notation that the Union requested a reopener on wages. (Jt. Exh. 5.)

[5] Richards' credible testimony regarding Cooper's demand for comparable wage information, as well as his efforts to produce such information was corroborated by Cooper. (Tr. 19-20, 33, 61-62, 93-94.)

[6] The total contract price was redacted from the exhibit.

Union had requested bargaining over the wage reopener, Cooper signed and returned the form to the Navy on January 18.[7]

Two days later, at 6:50 p.m. on January 19, Richards emailed Metaxa, Cooper and Charles Carroll attaching the Union's proposal and outlining it as follows:

> 1 was referring to your original email last year asking for them to be closed by the end of the year. Attached is the Union proposal for the WNY Contract.
> The 3% wage increase is based upon the raise the Uniformed Service members received for 2018, 2.4% and the fact that the proposed improvements to security since the deadly shooting in 2013 have yet to be completed and leave the employees still exposed to the act repeating itself[.]
> The Union is asking for an increase in the amount of personnel allowed to take leave at any one time. It has come to the [Union's] attention that the 5% number is insufficient for the amount of personnel assigned to the contract. Also the way how vacation is distributed for the most preferred dates of vacation, Independence Day, Thanksgiving, Christmas Day and New [Year's] Day has been a point of contention on the site so different" language has been proposed to help resolve the situation.
> Sick leave. The Presidential order mandates for 7 days of leave to be granted per year. This contract is not yet eligible for that benefit. Thinking of the benefit of the employees and the need of a softer transition for the company, the Union proposes to raise the sick days to six (6) from five (5) for the upcoming year.

The detailed proposal was attached to Richards' email as "Appendix A, Economic Provisions USPOA/Hana Management, 2-28-2018." It contained a wage increase proposal chart, with an "Effective" date of "2-28-2018" proposing to increase unit employees' hourly wage rates from $25.82 to $26.59.[8]

On January 22, instead of responding to the Union, the Company decided to strategize over the issue of how to tell the Union that it was too late to bargain over a wage increase for the period commencing on February 1. At 7:51 a.m., Metaxa emailed Cooper, "[c]hecking with you before I respond that they missed the deadline for a wage adjustment for this option year. How do you want to handle?" At 9:40 a.m., instead of immediately reaching out to Richards, Cooper asked Metaxa for "timeline of communications" other than those contained in the email chain provided between December 8 and January 19:

[7] Cooper assumed the Union would have been aware of the FAR regulations but conceded that there was still time to negotiate until January 22. (Tr. 92-93, 122-24; Jt. Exh. 6.) However, his testimony that he lacked any prior knowledge of the FAR requirement that the Union be notified of the Navy's exercise of the 2018 option year is simply not credible as the FAR provision that the Company relies on – 22.1012-2 – expressly refers to the union notice requirement at 22.1010. (Tr. 128-30.)

[8] The Company's answer averred that the Union's reference to the wrong date rendered the proposal "outside the scope of the referenced wage re-opener and therefore waived any further bargaining on that provision." Richards' January 19 email, Cooper's testimony and the Company's position statement eliminate any doubt that the Company understood Richards' proposal to refer to the CBA's reopener "for [w]ages that would go into effect on February 1, 2018." (Tr. 105-106, 112, 126; GC Exh. 2, 7.)

> We are past the deadline to incorporate any increases for the next option period, even if we wanted to. We should continue discussions, but any economic change will not take effect until 2019. Has HR done an updated wage survey? Depending on where we are in what we are willing to do, that will dictate our response.[9]

Over five hours later, at 2:57 p.m., Metaxa replied that the "entire email thread is below. They have been quiet all year until December 8th. Then nothing until this past Friday evening [January 19]." About an hour later, Cooper replied, "[t]hat is what I thought. Any updated survey on wages . . . or should I get HR going?" Metaxa replied that there had been no recent surveys. Cooper replied, "I'll get HR moving. In the meantime, respond back to Ishun and simply say you are in receipt of his email and we will respond shortly. CC me and Chuck. At some point near (perhaps the next email to him), I . . . take over the communication. Cooper also emailed Quan asking, "this one is for the Navy Yard. Will your recent update for Sam's DHS-DC project suffice? Quan replied that "it should be fine."

Metaxa wrapped up the exchange with Cooper at 4:02 p.m. by assuring him that he would reply to Richards as directed. Rather than email Richards immediately, however, Metaxa slow-walked a response to the following morning when he informed Richards that "[w]e are in receipt of this email and will respond shortly. Thank you."

Richards responded on February 6, 2018 that "[t]he Union is still awaiting a counter to the last proposal." Cooper replied a few minutes later that "Cliff no longer works for Hana. Mr. Charles Carroll is the new PM for this project. We will be responding to your proposal."

The Company pondered its response over the next several days. On February 6, Carroll emailed Cooper, asking, "when would you like to discuss? Cooper replied that "I need to organize first, Chuck. What is important to note is that the window for us to submit to the Navy an adjustment based on increased CBA wages is gone. We, therefore can't agree to an increase in the current option year. As soon as I get organized, I'll walk you through how we handle these. I may have our outside counsel serve as lead negotiator. Ishun has proven to be difficult to deal with, and he is likely to file an NLRB complaint. Carroll replied that he "[u]nderstood, and asked, "[w]eren't they supposed to submit their proposal in December or January to meet the contract option time line?

Despite Cooper's assurance to respond, the Company has never responded to the Union's January 19 wage proposal and, on April 25, 2018, the Union filed unfair labor practice charges.[10]

[9] Cooper, without further explanation, conceded on cross-examination that he "could have" negotiated with the Union on January 22 and "could have" told Waite that the parties were still in the process of negotiating wages, but chose not to. (Tr. 122-24.)

[10] Regardless as to whether the charge was filed on March 6 or April 25, Cooper's conceded that the Company never intended to reply to the Union's January 19 proposal. (Tr. 40, 70, 112-13, 125-26.)

LEGAL ANALYSIS

The complaint alleges that the Company has violated Section 8(a)(5) and (1) of the Act since January 23, 2018 by failing and refusing to bargain in good faith over wages pursuant to a re-opener provision in the CBA. In support of the allegation, the General Counsel refers to the Company's failure, notwithstanding its promise on two occasions, to respond to the Union's January 19 proposal to bargain over wage increases.

The Company denies the allegation, asserting that it promptly responded to the Union's December 8 request to bargain by requesting a proposal "ASAP." It further contends that the Union's bad faith delay in submitting a proposal over five weeks later and just three days prior to the FAR ten-day deadline negated the Company's duty to bargain. Finally, it asserts that the length of the delay, which it considers to be six-weeks, is insufficient in the absence of other wrongful conduct to make out a Section 8(a)(5) or (1) violation.

A. The Duty to Bargain

Section 8(d) obligates an employer to bargain in good faith with its employees' representatives regarding "[w]ages, hours, and other terms and conditions of employment." The refusal to bargain collectively and good faith over such mandatory subjects of collective bargaining violates Section 8(a)(5) and (1) of the Act. The employer's duty to bargain in good faith also applies to re-opener provisions in a collective bargaining agreement, a provision often utilized by parties to reserve subjects of bargaining for future negotiation. *See Speedrack, Inc.,* 293 NLRB 1054 (1989) ("parties to a collective bargaining agreement can, by mutual consent, include a reopener provision in the contract, by which they agree to open up specified subjects for bargaining before the expiration date of the contract.").

On December 8, the Union initiated the bargaining process over a wage increase to take effect in February 2018. The Company responded by requesting a proposal as soon as possible. Over the next five weeks, Richards, the Union's negotiator, unsuccessfully searched for comparable wages in order to generate a proposal. He engaged in such an effort because he knew that the Company required justification for proposed wage rates. Richards finally submitted a proposal to Cooper and Metaxa on January 19. Cooper and Metaxa discussed a response on January 22, which was ten days prior to the start of the option year. They had already decided, however, that they would not continue bargaining over a wage increase due to the timing of Richard's proposal. Rather than communicate that position to Richards on January 22, Cooper told Metaxa to simply inform the Union that the Company would "respond shortly." Metaxa then slow-walked that response to the next day, January 23, or nine days prior to the start of the option year. Richards followed-up on February 6, stating that he was waiting for a "counter to the last proposal." A short while later, Cooper replied that Metaxa was gone, mentioned his replacement and, once again, said that they "would be responding to your proposal." The Company, however, never did, and the Union filed an unfair labor practice charge on March 6, which it refiled on April 25.

The duty to bargain in good faith requires that both parties have a "sincere purpose to find a basis of agreement." *Health Care Serv. Group*, 331 NLRB 333, 335 (2000). As a threshold matter, the Company asserts that the Union's over five-week delay in responding to its

December 13 request for a proposal "ASAP" constituted bad faith, excused the Company from further bargaining and precludes a finding of bad faith on its part.

The test for bad faith is one that involves looking at the totality of the circumstances, and each case must turn on its own facts. *NLRB v. Truitt Mfg. Co*., 351 US 149, 153-54 (1956). In determining whether a party breached its obligation, the Board considers whether a party's behavior, under the circumstances, reveals an intention to frustrate the bargaining process. *See Calex Corp*., 322 NLRB 977, 987 (1997) (employer breached its duty to bargain by insisting on once-a-month meetings when such insistence was motivated by "purposeful delay" and a goal "not to reach an agreement with the Union").

Here, the evidence does not support a conclusion that the Union sought to frustrate the bargaining process. The Union's five-week delay was driven not by a desire to impede bargaining, but by Richards' attempts to obtain information from comparable security contracts to substantiate the Union's wage proposals – a condition known to be required by Cooper due to government regulations requiring proof that the proposed rates were reasonable. During that time, Richards was also involved in contentious bargaining with the Company on another government contract in the Washington, D.C. area. Moreover, Richards' experience from the previous year, when Waite pressured the parties to arrive at an agreement in one day, eliminated any incentive for Richards to delay producing a proposal. Due to the hurried circumstances at the time, the Union reluctantly agreed to a lower wage rate than originally sought but succeeded in including a wage reopener for future years.

Under the circumstances, there was simply no strategic benefit for Richards to intentionally delay. See *Crane Co*., 244 NLRB 103, 112 (1979) (employer breached its duty to bargain because it "evidenced a desire to procrastinate."). Cf. *New Brunswick General Sheet Metal Works*, 326 NLRB 915 (1998) (employer was excused from its bargaining obligations where the union refused to negotiate in the presence of the company's attorney); *Louisiana Dock Co*. 293 NLRB 233, 235–36 (1989) (employers were released from their duty to negotiate over mandatory subjects of bargaining when a union conditioned bargaining on employers' acceptance of an improper multilocation bargaining unit).

B. The FAR Notice Requirements

Pursuant to FAR 22.1012-2(b), federal service contractors are required to provide notice of any modifications to their collective bargaining agreements to the agency at least ten days before "commencement of the work" for the changes to be effective. The regulation further states in the very next paragraph at 3(c), however, that such limitations "shall apply only if timely notification required in 22.1010 has been given." Conversely, Section 22.1010(b) states that for the limitations in paragraph 22.1012-2(b) to apply, the contracting officer must notify the employees' collective bargaining agent in writing of, *inter alia*, the exercise of a contract option at least thirty days before the option is exercised.

The CBA was incorporated by reference into the Navy contract. On December 11, 2017, a Navy contract specialist notified the Company that the government was exercising its third-year option under the contract. The Navy neglected, however, to provide similar notification to

the Union as required in FAR 22.1010 and 22.1012-2,[11] This oversight negated the 10-day regulatory deadline that served as the basis of the Company's failure to bargain since the applicability of FAR 22.1012-2 was, by its terms, conditioned on notice to the Union. Although there is no evidence that Cooper knew that the Navy failed to notify the Union of the option year renewal pursuant to FAR 22.1012-3(c) and 22.1010(b), these provisions factored into the bargaining process because of what the Company failed to do. The Company abandoned the bargaining process by promising responses to the Union's proposal that never came. Had the Company responded on January 22 or soon thereafter by communicating its position that the Union's proposal was untimely because of the ten-day notice requirement, the Union would have been put on notice that the Company was relying on FAR 22.1012-2(b). Upon becoming apprised that the Company was relying on that provision, the Union would have realized, as Richards did in reaching out to Waite in November 2018, that the union notice requirement in the very next paragraph had not been provided. Clearly, a little bit more communication on the Company's part would have provided it and the Union with a basis to seek an extension of time to engage in bargaining from the Navy.

C. The FAR Deadline did not Negate the Duty to Bargain

The duty to bargain over a proposal exists even in circumstances where the proposal, if accepted, would deprive the employer of an external benefit. *National Fuel Gas Distribution Corp*., 308 NLRB 841,844 (1992) (employer was obligated to bargain with the union over a proposed benefits plan even where the plan would cause the employer to lose an advantageous tax status); see also *Dynaelectron Corp.,* 286 NLRB 302, 304 (1987) (government contractor was obligated to bargain over higher wages even where it feared its contract price might not be sufficient to compensate it for the higher wages).

In fact, an employer may not refuse to bargain over a proposal even where the proposal would bring the employer out of compliance with federal law, much less where agreeing to the union's proposal would merely cause the employer to risk the loss of a government benefit such as reimbursement for wages. *See Swanson Group, Inc*. 312 NLRB 184, 185 (1984). Instead, the employer's remedy in such a situation is the same as it would be when faced with any other undesirable proposal: the employer is free to raise its reservations during the bargaining process. In *Swanson Group, Inc*., a successor employer argued that it had no duty to bargain with its employees' union because several provisions of the CBA between the union and the predecessor employer would cause the employer to violate the SCA. The Board rejected this argument, holding that the employer's remedy was not to refuse to bargain, but simply to address its concerns during the bargaining process: "If (the employer) believes that the clauses (of the collective bargaining agreement) are illegal, it can negotiate a new agreement." *Id.*

Thus, assuming *arguendo* that the FAR deadline applied to the Union's request to negotiate wage increases in order for the Company to receive federal reimbursements for any wage adjustments, it was still bound by the duty to bargain. And even if the government refused the proposed wage increases, the Company's situation would still be no different from that of any other employer subject to economic pressures that might influence its behavior at the

[11] In contrast, the Navy did include the Union in its November 2018 notifications exercising its option to extend the contract for the 2019 option year.

bargaining table. In short, the economic constraints within which the Company had to operate because of the FAR were "no different from the economic restrictions placed on any private contractor by the marketplace." *Dynaelectron Corp.,* 286 NLRB at 304.

D. The Company's Bad Faith

As discussed above, the duty to bargain in good faith entails a sincere desire to reach agreement. *Health Care Serv. Group*, 331 NLRB at 335. Determining whether a party has breached that duty requires considering the mindset of the party in question, and whether the evidence demonstrates that the party had an intent to frustrate the bargaining process, for example, through delay. *Calex Corp*., 322 NLRB at 987. "The Board has held in numerous cases that a party who limits and delays meetings has not met its obligation to meet and bargain." *Lancaster Nissan*, 344 NLRB 225, 227; *see Health Care Serv. Group*, 331 NLRB at 335-36 (holding that delaying tactics are an indicia of bad faith). It is an act of bad faith to "unduly…impede the progress and consummation of negotiations." *Silby-Dolcourt Chemicals Industries, Inc*., 145 NLRB 1348, 1350 (1964).

The Company's alternative argument – that its failure to bargain between January 23 and the filing of charges was not an unreasonable period – is unavailing. It is not the period that elapsed here, but rather, the Company's evasiveness in failing to respond on or shortly after January 22 that demonstrated its bad faith intention to frustrate the bargaining process. Its failure to communicate at all, coupled with the absence of any valid reason for that failure, was enough to establish a breach of the duty to bargain. See *Elite Marine Serv*., 306 NLRB 735, 737 (1993), where the Board found a breach of the duty to bargain when an employer failed to respond to a union's request to negotiate after leading it on with assurances that the company would reach out to set up a meeting.

The evidence strongly suggests that the Company's failure to respond to the Union was an intentional delay tactic. During the Company's January 22 internal maneuvering that followed Richards' wage proposal, Cooper stated that "we are past the deadline to incorporate any increases for the next option period, even if we wanted to . . . any economic change will not take effect until 2019." In Cooper's February 6 email, he stated that because of the missed FAR deadline, "we, therefore, can't agree to an increase in the current option year." This language, coupled with the subsequent failure to respond to the Union, which continued as of the time of the hearing, amounts to an abandonment of the bargaining process. See *NLRB v. Montgomery Ward, Co.,* 133 F.2d 676, 687 (9th Cir. 1943) (bad faith where an employer deliberately refrained from responding to a union's request for only three days when the employer knew all along what its answer would be and deliberately refrained from answering in order to stall).

Under the circumstances, violated Section 8(a)(5) and (1) of the Act by refusing and failing to bargain over the Union's wage increase proposal on and after January 23, 2018.

CONCLUSIONS OF LAW

1. HBC Management Services, Inc. (the Company or Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The National Union, United Security & Police Officers of America (the Union or Charging Party) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the following unit the Company violated Section 8(a)(5) and (1) of the Act:

All full-time and regular part-time security officers employed by the Employer at the Washington Navy Yard NAVSEA and Military Sealift Command (MSC).

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order the Company to, on request, bargain in good faith with the Union as the exclusive representative of unit respect to wage increases retroactive to the period between February 1, 2018 and January 31, 2019 pursuant to the reopener provision set forth in the extant collective bargaining agreement and, if an understanding is reached, embody the understanding in a signed agreement. The Company shall also post and send by electronic means, or by mail if it is no longer in business, an appropriate Notice to all employees who were in the unit at any time during the relevant period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, HBC Management Services, Inc., Wayne, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the United Security & Police Officers of America as the exclusive collective-bargaining representative of employees in following appropriate unit:

All full-time and regular part-time security officers employed by the Employer at the Washington Navy Yard NAVSEA and Military Sealift Command (MSC).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described unit respect to wage increases retroactive to the period between February 1, 2018 and January 31, 2019 pursuant to the reopener provision set forth in Article XXVI and Appendix A of the collective bargaining agreement effective January 9, 2017 to January 31, 2020 and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in the Washington D.C. Navy Yard copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 1, 2019

Michael A. Rosas
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT, upon request, refuse to bargain in good faith with the United Security & Police Officers of America as the exclusive collective-bargaining representative of our employees in following appropriate unit:

All full-time and regular part-time security officers employed by the Employer at the Washington Navy Yard NAVSEA and Military Sealift Command (MSC).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain in good faith with United Security & Police Officers of America as the exclusive collective-bargain representative of our employees in the above-described bargaining unit with respect to employee wage increases retroactive to the period between February 1, 2018 and January 31, 2019 as set forth in Article XXVI and Appendix A of the collective bargaining agreement effective January 9, 2017 to January 31, 2020 and, if an understanding is reached, embody such understanding in a signed writing agreement.

HBC MANAGEMENT SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-219166 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.